

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL H.,	:	
Plaintiff,	:	
	:	
v.	:	Civil No. 3:17CV636(AWT)
	:	
KILOLO KIJAKAZI,	:	
ACTING COMMISSIONER	:	
OF SOCIAL SECURITY ¹ ,	:	
Defendant.	:	

RULING ON MOTION FOR ATTORNEY'S FEES

For the reasons set forth below, Attorney Charles Binder's motion for attorney's fees pursuant to 42 U.S.C. § 406(b) is being granted.

I. Factual Background

On December 4, 2018, the court awarded the plaintiff \$5,000 for attorney's fees pursuant to the Equal Access to Justice Act. The court ordered direct payment to Attorney Binder pursuant to a March 23, 2017 assignment by the plaintiff to his attorney.

¹Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021 and is substituted for Nancy A. Berryhill as the defendant in this suit pursuant to Rule 25(d) of the Federal Rules of Civil Procedure ("An action does not abate when a public officer who is a party in an official capacity . . . ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party.") and the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) ("Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.").

On May 12, 2020, Attorney Binder filed a motion for attorney's fees pursuant to 42 U.S.C. § 406(b), seeking 25% of past due benefits, which is \$15,266.00, in accordance with a contingency fee agreement dated March 25, 2017. In support of the motion, Attorney Binder affirms that on May 1, 2020 his office "received a copy of Plaintiff's Notice of Award from the Social Security Administration" ("Administration"), "indicating that \$15,266.00 from Plaintiff's past due benefits were being withheld for attorney's fees." Affirmation (ECF No. 29-2) at 4. Instead of a copy of a Notice of Award ("NOA") though, counsel filed a Notice of Change in Benefits dated November 20, 2019, with a fax coversheet from the Administration dated May 1, 2020. The fax cover sheet states, "As requested", and also states, "Please see attached notice of award for your information." Mot. for Att'y Fees, Ex. C (ECF No. 29-3) at 7.

The defendant observed that the court must determine the timeliness of the motion or whether more information is needed, and the court must determine the reasonableness of the requested fee. First, the defendant notes that Attorney Binder's motion was filed "more than seventeen months after the November 20, 2019 Notice of Change of Benefits Letter", which is "not the same as [a] Notice of Award letter"; and second, that the de facto hourly rate for 26.6 hours of work would be \$596.33 per hour. Def.'s Resp. (ECF No. 32) at 2-3.

In response to the court's Notice to Plaintiff's Counsel (ECF No. 34) seeking additional information about the NOA, Attorney Binder filed a supplemental affirmation. He affirms that his office sent a written notice to the Administration dated October 25, 2019, notifying it "that upon receipt of the plaintiff's Notice of Award, a petition to obtain approval of a fee would be submitted"; that on April 27, 2020 his office telephoned the Administration's "payment center to inquire about the status of the plaintiff's Notice of Award"; that the "representative at the payment center stated the case needed to be reviewed by a claims authorizer before any information could be given on the status of the NOA"; that his office "received a faxed copy of the Plaintiff's Notice of Change in Benefits dated November 20, 2019 in response to the telephone call made on April 27, 2020; and that "the Notice of Change of Benefits is the only notice" his "office has received from" the Administration regarding the plaintiff's past due benefits. Affirmation (ECF No. 35).

II. Analysis

There are two statutes that address attorney fees in the context of Social Security appeals: the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"), and Section 206(b) of the Social Security Act, 42 U.S.C. § 406(b). "Fee awards may be made under both prescriptions, but the claimant's attorney must 'refun[d]

to the claimant the amount of the smaller fee.'" Gisbrecht v. Barnhart, 535 U.S. 789, 796 (2002) (citing Act of Aug. 5, 1985, Pub.L. 99-80, § 3, 99 Stat. 186).

A. Timeliness

In Almodovar v. Saul, No. 16-CV-7419 (GBD) (SN), 2019 WL 7602176 (S.D. New York Oct. 4, 2019), report and recommendation adopted, 2019 WL 6207784 (S.D.N.Y. Nov. 21, 2019), the court enlarged the filing period where the motion for attorney's fees was filed 14 days after the Administration sent the attorney the NOA, but nearly three months after the Administration sent it to the plaintiff, because the attorney stated under penalty of perjury that he had promptly filed the motion after his actual receipt of notice.

The court explained its reasoning as follows:

[P]ursuant to Rule 54 of the Federal Rules of Civil Procedure, a fee application under § 406(b) must be filed within 14 days after the entry of judgment. Sinkler v. Berryhill, 932 F.3d 83, 85 (2d Cir. 2019). . . . [T]he doctrine of equitable tolling [] extend[s] the time to file a fee motion until 14 days after the claimant is notified of the amount of any benefits award. Id. at 85, 87.

. . . .

In Walker v. Astrue, cited favorably in Sinkler, the Third Circuit held that "the application of the filing deadline is tolled until the notice of award is issued by the Commissioner, and counsel is notified of that award." 593 F.3d 274, 280 (3d Cir. 2010) (emphasis added). . . . [T]he court in Sinkler indicated that the relevant date is when counsel, not the claimant, is notified of the benefits calculation. See Sinkler, 932 F.3d at 88 ("Once counsel receives notice of the benefits award . . . there is no sound

reason not to apply [Rule 54's] fourteen-day limitations period to a § 406(b) filing.") (emphasis added).

In any event, the Court does not need to decide the proper interpretation of Sinkler at this time. Even assuming the filing period began to run when Plaintiff received the NOA . . . [t]he deadlines imposed by Rule 54 do not apply if a "court order provides otherwise." Fed. R. Civ. P. 54(d)(2)(B). As a result, and as noted in Sinkler, district courts can "enlarge the filing period where circumstances warrant," and the Court of Appeals will "generally defer to a [lower court] in deciding when such an alteration is appropriate." Sinkler, 932 F.3d at 89-90.

Id. at *2.

In Tate v. Colvin, No. 3:13CV904-DPJ-FKB, 2016 WL 744474, at *4 (S.D. Miss. Feb. 23, 2016), the court enlarged the filing period where "a balance of the equities favor[ed] allowing the motion to proceed". The court found that "it does not appear that counsel was dilatory in withholding the motion"; "the requested award is in line with the fee agreement . . . [and] granting the award would not prejudice the claimant, but denying the award would eliminate a benefit due Plaintiff's counsel" under the fee agreement; and the Administration was holding funds to pay the attorney's fees. Id. at *3-*4.

In Blair v. Saul, No. 15-CV-307-A, 2020 WL 2744108 (W.D.N.Y. May 27, 2020), the court enlarged the filing period where "there does not appear to be prejudice to either party by Plaintiff's delay in filing his motion and Plaintiff's counsel offers at least some (albeit, conclusory) justification for the delay". Id. at *3.

Here, Attorney Binder affirms that he notified the Administration that upon receipt of the plaintiff's NOA, a petition to obtain approval of attorney's fees would be submitted. He affirms that his office followed up on April 27, 2020 by telephoning the Administration's payment center to inquire about the status of the NOA and was informed that the case needed to be reviewed by a claim authorizer. Attorney Bender further affirms that the only notice that there had been an award his office received from the Administration was in response to the April 27, 2020 call, and it was in the form of the fax dated May 1, 2020 sending the plaintiff's Notice of Change of Benefits.

Counsel was diligent and filed the motion for attorney's fees 11 days after receiving the faxed notice. Granting the motion would not prejudice the plaintiff, who agreed to the requested attorney's fees, and denying the motion would eliminate a benefit due to counsel under the contingency fee agreement. See Tate, 2016 WL 744474, at *3 ("Those courts that have exercised their discretion to waive the requirement have noted that the motion was filed within a reasonable amount time, caused no prejudice to the plaintiff, and denying the requested fees would render an unconscionable result.").

Here, the balance of the equities favors enlarging the time for filing the motion.

B. Reasonableness

Section 406(b) provides:

Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner . . . may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

42 U.S.C. § 406(b)(1)(A).

"Most plausibly read . . . § 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases." Gisbrecht v. Barnhart, 535 U.S. 789, 807 (2002).

When there is a contractual contingency fee arrangement, a court considers the following factors in gauging the reasonableness of a requested award:

1) whether the requested fee is out of line with the "character of the representation and the results the representation achieved;" 2) whether the attorney unreasonably delayed the proceedings in an attempt to increase the accumulation of benefits and thereby increase his own fee; and 3) whether "the benefits awarded are large in comparison to the amount of time counsel spent on the case," the so-called "windfall" factor.

Joslyn v. Barnhart, 389 F. Supp. 2d 454, 456 (W.D.N.Y. 2005) (quoting Gisbrecht, 535 U.S. at 808, 122 S. Ct. 1817).

With respect to the third factor—whether the award constitutes a “windfall”—courts consider the following factors:

1) whether the attorney's efforts were particularly successful for the plaintiff, 2) whether there is evidence of the effort expended by the attorney demonstrated through pleadings which were not boilerplate and through arguments which involved both real issues of material fact and required legal research, and finally, 3) whether the case was handled efficiently due to the attorney's experience in handling social security cases.

Blizzard v. Astrue, 496 F. Supp. 2d 320, 323 (S.D.N.Y. 2007) (quoting Joslyn, 389 F. Supp. 2d at 456-57).

Rodriguez v. Colvin, 318 F. Supp. 3d 653, 657-58 (S.D.N.Y. 2018).

While the court need not make mathematical calculations, it should, of course, determine whether the contingency percentage is within the 25% cap; it should also consider whether there has been fraud or overreaching in making the agreement, and whether the requested amount is so large as to be a windfall to the attorney.

Wells v. Sullivan, 907 F.2d 367, 372 (2d Cir. 1990). “[T]he best indicator of the ‘reasonableness’ of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate”, Wells, 907 F.2d at 371, and “the most critical factor is the degree of success obtained”, Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). “[C]ourts within this Circuit have held” that rates “similar” to the de facto rate of \$596.33 “are not a windfall . . .” Vasquez v. Saul, 3:17-cv-183 (WIG), 2020 WL 4812849, at

*3 (D. Conn. Aug. 18, 2020) (finding \$791.44 was "not a windfall" and citing cases where higher hourly rates between \$1,009.11 and \$2,100 were found to be "reasonable").

Here, the contingency agreement was for 25% of the total past-due benefits. Counsel's efforts were successful in securing \$61,064.00 in past-due benefits for the plaintiff. There is no evidence of fraud or overreaching; of the requested fee being out of line with the character of the representation and the results the representation achieved; of unreasonable delay designed to accumulate benefits to thereby increase fees; or of inefficiencies given counsel's level of experience and representation through multiple appeals. The case involved issues of material fact that required legal research and case-specific analysis of relevant case law and factual circumstances. See Pl.'s Mem. in Supp. (ECF No. 17) and Reply (ECF No. 24). The hours expended are within the twenty-to-forty-hour benchmark generally associated with Social Security cases. See Richardson v. Berryhill, No. 3:15CV01452 (HBF), 2018 WL 3218661, at *2 (D. Conn. July 2, 2018) ("Courts throughout the Second Circuit have consistently found that routine Social Security cases require, on average, between [twenty] and [forty] hours of attorney time to prosecute." (quoting Poulin v. Astrue, No. 3:10CV1930 (JBA) (JGM), 2012 WL 264579, at *3 (D. Conn. Jan. 27, 2012))). See also Cobb v. Astrue, No.

3:08CV1130 (MRK) (WIG), 2009 WL 2940205, at *3 (D. Conn. Sept. 2, 2009). Therefore, the court will grant Attorney Binder's motion and award the requested \$15,266.00 to counsel, who shall refund the EAJA award of \$5,000.00 to the plaintiff as required by law.

III. Conclusion

Attorney Binder's motion for attorney's fees pursuant to 42 U.S.C. § 406(b) (ECF No. 29) is hereby GRANTED in the amount of \$15,266.00 to be paid directly to Attorney Charles E. Binder. Upon receipt of this amount, Attorney Binder shall refund the previously awarded EAJA fees of \$5,000.00 to the plaintiff.

It is so ordered.

Dated this 9th day of November 2021, at Hartford,
Connecticut.

/s/ Judge Alvin W. Thompson

Alvin W. Thompson
United States District Judge